

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2018-364-WS**

Stephen and Beverly Noller and)	
Michael and Nancy Halwig,)	
Complainants,)	
v.)	COMPLAINANTS' RESPONSE to the BRIEF
)	on JURISDICTIONAL MATTERS BY
Daufuskie Island Utility Co., Inc.,)	RESPONDENT
Respondent.)	
_____)	

Complainants hereby file this Response to the Brief on Jurisdictional Matters by Respondent Daufuskie Island Utility Company, Inc. ("DIUC"). For the reasons set forth below and in Complainants' Brief Confirming Jurisdiction, this Commission has jurisdiction over this matter, because (1) DIUC has failed to provide adequate and proper water and sewer service to Complainants; and (2) DIUC has attempted to circumvent the Commission's authority over rates by charging the individual homeowner Complainants the costs of installation of replacement facilities and equipment now owned by the utility and other costs outside of its approved rates without Commission approval.

1. DIUC's agreement to provide water and sewer service to Complainants after the filing of the Complaint in this matter does not affect the jurisdiction of the Commission.

Respondent argues that the Commission does not have jurisdiction because Complainants' request to restore service is moot. However, DIUC only agreed to provide service after Complainants filed the Complaint in this matter. DIUC has failed to provide service to its customers for over two (2) years. DIUC has denied service during this time by failing to replace the mains necessary and based on its position that Complainants must pay DIUC tax and attorney fees as a condition of DIUC's provision of water and sewer services. If this Complaint is

dismissed, DIUC will likely withdraw service again. Prior to restoring service, all parties in this matter agreed that restoration would not prejudice any party's position before the Commission.

The Complaint requests appropriate relief, including adequate and proper service, a refund of the charges *or such other just and proper relieve as the Commission may provide*.

2. The Customer Service Agreement does not divest this Commission of jurisdiction.

Respondent argues that the Commission does not have jurisdiction, because it alleges that Complainants are asking the Commission to undo the Customer Service Agreement, which was signed under duress. In its Brief, DIUC portrays the Complaint in this matter as a purely private contractual dispute and not a rate setting matter. DIUC seems to believe that the Commission only has jurisdiction over rates and ignores this Commission's broad authority over services, practices and standards. The Commission should have reviewed the Customer Service Agreement for approval or disapproval. DIUC's failure to submit the Customer Service Agreement for approval prior to its execution violates state regulation for contract approval and shows DIUC's efforts to circumvent the rate setting authority of the Commission. The Commission has jurisdiction over this matter for both DIUC's failure to provide service and its circumvention of the rate process.

While there is a history of communication between the utility and the ORS staff, DIUC never asked for approval of ORS until September 2018 after the installation was complete and the issue of the potential tax liability was raised.¹ The Commission should exercise its jurisdiction

¹ See Testimony of Michael J. Guastella, Vice President of Operators for Guastella Associates, Inc., which provides utility rate, valuation and management consulting services to DIUC, dated February 6, 2019, at 20:1-22:2; see also Letter from ORS to Dr. John Halwig dated December 2, 2016, Complainants 00053-54, in which ORS confirmed that it informed DIUC of the applicable PSC regulations concerning its responsibilities.

and require public utilities to provide the Commission and Staff the opportunity to review and approve such contracts affecting what a utility can charge customers prior to their being executed and prior to unilateral decisions concerning what will and what will not be included in rate making before the Commission.

DIUC's failure to provide for the capital costs in its documentation for setting rates of the replacement mains to its customers' homes, when it admits those mains were at risk from experience with them, is an attempt to avoid regulation by this Commission. The capital costs for the replacement mains is a factor for determining the rates that DIUC can charge to its customers, if approved by this Commission. Having avoided bringing the question to this Commission, DIUC decided that it would not bear that cost but charge it directly to only certain of its customers. This Commission has jurisdiction to remedy that unilateral assumption of its authority.

The mains that DIUC forced the Complainants to install were replacement mains and not new mains. Damage causing the need for replacement of mains can be caused by hurricanes and erosion, and also by sinkholes and other calamities. The mains were owned and operated by DIUC and the responsibility of DIUC. DIUC does not have the regulatory or legal authority to make decisions concerning Complainants' homes or the management of the beachfront and coastal resources involved at their location. Nevertheless, DIUC usurps not only this Commission's authority but also that of federal and state agencies governing the South Carolina coastline and made a unilateral determination that there is no 'permanency' of the Complainant's homes to support the cost of installing the replacement mains. DIUC admits that it made a decision that Complainants would not be permanent customers:

...the Complainants cannot be considered reasonably permanent customers. Accordingly, no investment should be made by DIUC because it is unlikely that the Complainants would generate ongoing revenues to support an investment comparable to the average investment reflected in the rates being paid by existing customers, thereby shifting the risk of the cost recovery of the investment from the Complainants to existing customers through future rate setting.

Testimony of John F. Guastella, President of Guastella Associates, LLC, which provides utility rate, valuation and management consulting services to DIUC, dated February 6, 2019, at 4:11-19. The replacement of DIUC's mains to service existing customers is the responsibility of DIUC, and its failure to do so is an issue squarely within the jurisdiction of this Commission. To allow the charging of such costs of replacing its own facilities, especially when it knew the chance of damage was present and did not prepare for it so as to continue to comply with regulations requiring maintenance of service, allows a utility to condemn property and put extreme financial pressure on certain of its customers.

The facts of this matter provide jurisdiction to the Commission for DIUC's failure to provide adequate and proper service to its customers, its charging of customers of cost of installation, its failure to submit the contract for services to the Commission for approval prior to its execution, and DIUC's attempt to circumvent the Commission's rate approval authority.

3. The cases cited by Respondent are too distinguishable to be relevant to the issue of the Commission's jurisdiction in this matter.

First, Respondent argues that the Commission does not have jurisdiction based on its denial of standing to a shareholder of SCE&G, citing See Order No. 2018-339, *Joint Application & Petition of S.C. Elec. & Gas Co. & Dominion Energy, Inc. for Review & Approval of A Proposed Bus. Combination*, No. 2017-370-E, 2018 WL 2264265, at *1 (May 9, 2018). This decision is factually distinguishable from the current Complaint. The Commission's denial of standing to a

shareholder is too distinguishable from the claims of the Complainant customers in this matter to have any bearing.

Next, Respondent argues that the Commission does not have jurisdiction based on the *Lindler v. Baker*, 280 S.C. 130, 311 S.E.2d 99 (Ct. App. 1984) and *Martin v. Carolina Water Servs., Inc.*, 273 S.C. 43, 254 S.E.2d 52 (1979). Respondent attempts to characterize the Complaint as a solely an enforcement of contract matter.

The *Lindler* and *Martin* cases are factually distinguishable from this matter. In *Lindler*, the Court of Common Pleas determined that it had jurisdiction to enforce a lease agreement and a purchase contract, which identified which party must pay sewer service fees. *Lindler*, 311 S.E.2d at 101. In *Martin*, the South Carolina Supreme Court determined that the Court of Common Pleas had jurisdiction “to enforce the payment of the compensation defendant agreed to pay for the property it bought.” *Martin*, 254 S.E.2d at 52. In both cases, the contracts at issue pre-dated the regulation that required such contracts to be approved by the Commission. *Lindler*, 311 S.E.2d at 133. At the time of the facts involved in the *Martin* case, the Commission did not yet regulate water and sewer service. *Martin*, 254 S.E.2d at 52.

In its Brief, Respondent references “undisputed facts.” Complainants do not agree that all facts cited by Respondent are undisputed. Complainants do not address each and every disagreement with those facts here but, instead, address only the legal arguments necessary to confirm the Commission’s jurisdiction in this matter.

In its Brief, Respondent cites S.C. Code Ann. § 58-5-270 and §58-5-710, both of which provide for jurisdiction in this matter. The Commission has not only the explicit authority provided in the statutes and regulations cited above and in Complainants’ Brief but also the implicit

authority needed to carry out those responsibilities. *See Hamm v. Central States Health and Life Co. of Omaha*, 299 S.C. 500, 386 S.E.2d 250 (1989)(holding in favor of the implied power to issue refunds).

For all of the reasons set forth above and in Complainant's Brief, Complainants request that this Commission acknowledge its jurisdiction of this matter and reschedule the hearing as soon as possible.

Respectfully submitted,

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